Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Implementation of Section 621 (a) (1) of the Cable Communication Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	§ § § §	**MB Docket No. 05-311**

TEXAS COALITION OF CITIES FOR UTILITY ISSUES' ("TCCFUI") REPLY COMMENTS ON CABLE FRANCHISING FURTHER NOTICE OF PROPOSED RULEMAKING

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COMES NOW the Texas Coalition of Cities for Utility Issues (Referred to as "TCCFUI"') and files these Reply Comments in the Federal Communications Commission's (hereinafter "FCC" or "Commission") March 5,2007 ***Further Notice of a Proposed Rulemaking ("Further Notice")?***

I. OVERVIEW OF REPLY COMMENTS

TCCFUI supports and adopts the comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Alliance for Community Media, and the Alliance for Communications Democracy, filed in response to the ***Further Notice.***

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[1] Attached as Exhibit **A** to the TCCFUI Comments filed Feb. 6, 2006, in the *In the Matter of implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992,* MB Docket No. 05-255, *Notice of Proposed Rulemaking* (released November 18, 2005). ("*CableFranchising NPRM*") was a representative list of City members of TCCFUI.

[2] *In the Matter of implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992,* MB Docket No. 05-311, *Further Notice of Proposed Rulemaking* (released March 5, 2007) (*"Order",* as to certain conclusions¶¶ 1-138, "*Further Notice*" as to these reply comments, ¶¶ 139-143.)

TCCFUI's Reply Comments will focus on five issues:

1.) The FCC was correct in its position to not preempt any state laws governing cable franchising[3], such the *2005* state-issued cable and video franchise legislation enacted in Texas[4];

2.) The FCC lacks jurisdiction and was in error as to its "clarifications" in the interpretations of non-monetary services applying as credits to the 5% franchise fee cap, and as to its narrow characterization of what constitutes "capital cost" for PEG access facilities' (with a specific reply opposing Time Warner's Comments to use Generally Accepted Accounting Principles ("GAAP") in interpreting "gross revenue" in all franchises);

3.) The lack of FCC jurisdiction to preempt existing incumbent franchises;

4.) The FCC lacks jurisdiction and was in error as to its authority to preempt and negate state law requirements to obtain a separate cable franchise when an entity has "other" pre-existing authority to use the rights of ways; and

5.) Urging the Commission to clarify that the Public Utility Commission of Texas ("PUCT") may enforce and promulgate customer service standards as the statutorily designated Local (cable/video) Franchising Authority ("LFA") in Texas.

While there was a specific request in the *Cable Franchising NPRM* that "[parties] should present empirical data on the extent to which LFAs [local franchising authorities] unreasonably refuse to award competitive franchises. We seek record evidence of both concrete examples and broader information that demonstrate the extent to which the problem exist."[6] While city after city

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[3] *Order,* Note 2 and ¶ 126

[4] CHAPTER 66, TEXAS UTILITIES CODE (Supp. 2005), on state-issued cable and video franchise ("2005 Texas Cable Franchising Statute"). Attached as Exhibit **A** to TCCFUI's March 27, 2006 Reply Comments in the *Cable Franchising NPRM* is a summary of the key provisions in 2005 Texas Cable Franchise Statute.

[5] *Order,* ¶ ¶ 94-120

[6] *Cable Franchising NPRM,* ¶ 13

in their filed comments compiled with the Commission's request for specificity, telephone industry coininenters, by and large ignored the Commission's request for specificity yet the FCC does not note this omission to comply--except in the Dissent.[7] TCCFUI would respectfully request that the FCC disregard Comments that did not adhere to this specificity requirement

II. THE FCC WAS CORRECT IN ITS POSITION NOT TO PREEMPT ANY STATE LAWS GOVERNING CABLE FRANCHISING.

The FCC was correct in its position not to preempt any state laws governing cable franchising[8], such the 2005 state-issued cable and video franchise legislation enacted in Texas.' Of course Texas is but one of several states that has such a state-wide cable franchising regime. TCCFUI would adopt by reference the arguments and legal analysis of the New Jersey Board of Public Utilities as to the clear public policy reasons for such an exemption from preemption."

TCCFUI would urge that the Commission take notice of litigation pending in the federal Fifth Circuit Court of Appeals as to the transitioning provisions of the existing incumbent cable franchises as part of the new cable franchising regulatory scheme adopted in the 2005 Texas Cable Franchise Statute--the same 2005 Texas Cable Franchise Statute that was lauded by the Commission in its *Order*.[11]

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[7] *Further Notice*, Separate Statements, Commissioner M. Copps, (5th para.) and Commissioner J. Adelstein (3rd page, 2nd para.).

[8] *Order*, Note 2 and ¶ 126.

[9] 2005 Texas Cable Franchising Statute.

[10] Comments of the New Jerseys Board of Public Utilities, filed April 12, 2007 ("NJBPU Comments"). See also Comments of the Town and Cities of Abington, *et al*, Massachusetts and Towns of Amherst, *et al*, New Hampshire, filed **April** 18,2007, page 6.

[11] *Order*, ¶ 16, "appear[ing] to offer promise in assisting new entrants to more quickly begin offering consumers a competitive choice among cable providers."

In August *2006* the Texas Cable and Telecommunications Association ("TCTA"), whose members are, principally incumbent cable operators, challenged the transitioning provisions in the *2005* Texas Cable Franchise Statute moving the state's system of franchising cable operators from a municipal-issued to a state-issued system. The transition provisions require incumbent cable providers to fulfill obligations under existing franchise agreements until those agreements expire.[12] The TCTA's central complaint is that existing incumbent cable operators are bound to their existing municipal franchise agreements and ineligible for the state-issued franchises until the existing local franchise expires, but only in the areas where they have a franchise.

Texas law has long held that a cable franchise is a lawfully binding contract negotiated by two parties, the cable operator and a municipality, with both parties expecting in good faith for that agreement to be binding until it expires by its own terms.[13] In crafting this legislation, once the legislature determined to move to state-level franchising, it had to address the question of what happens to the existing cable franchise agreements between Texas cities and incumbent cable providers. The local franchise relationships were longstanding, and municipalities had come to have significant reliance interests in many of the franchise provisions that had been developed to provide community benefits. The *2005* Texas Cable Franchise Statute honors the existing cable franchises until they terminate in a transition compromise reflecting the balance the legislature struck among competing interests, the benefits to cities and their residents from these continued obligations by cable operators, with the value of those benefits to each city typically far exceeding their cost to the

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[12] *Texas Cable and Telecommunications Association v. P.U.C. Commissioners,* 458 F.Supp.2d 309 (W.D. Tex., 2006, pending appeal to 5th Cir.)

[13] *City of Jacksonville v. Gen. Tel. Co., 538* S.W.2d 253, 255 (Tex.Civ.App.-Tyler 1976) "It is generally conceded that a franchise is the subject of a contract between the grantor and grantee and that it does in fact constitute a contract when, as here, the requisite element of consideration **is** present. It is binding mutually upon the grantor and grantee and is enforceable according to its terms and tenor. 36 Am.Jur.2d Franchises sec. 6, p. 728 (1968)."

operators. The transitioning provisions for existing franchises in the 2005 Texas Cable Franchise Statute were not unlike the 1984 Cable Act transitioning provisions for existing franchises.[14] 47 U.S.C. §§ 554(i)(1)(C) and 557 similarly grandfathered existing agreements when it was adopted in 1984.

In September of 2006, the Federal District Court dismissed the case. The court concluded that TCTA's case was not "ripe" for litigation because the had TCTA failed to show a concrete, specific example of how being bound to the existing franchise agreements until expiration would cause them economic harm, based in part on TCTA's counsel statement at oral argument to the Judge that "it was too soon to tell''. TCTA has now appealed the dismissal to the Fifth Circuit Court of Appeals. The success of the 2005 Texas Cable Franchise Statute, which has been cited as a model for state-level franchising around the country, depends on the ability of Texas cities to rely en the prevision of existing cable franchises until their expiration. As such, Texas cities continue to litigate the issue in federal court with the incumbent cable operators to allow an orderly transition from the existing local franchises to state issued franchise.

III. THE FCC LACKS JURISDICTION UNDER SECTION 622 [47 U.S.C. § 542] TO INTERPRET "FRANCHISE FEES" AND WAS IN ERROR AS TO ITS "CLARIFICATIONS" AS TO WHAT "CREDITS" MAY APPLY TO THE 5% FRANCHISE FEE CAP

TCCFUI respectfully contends that Section 622 [47 U.S.C. § 542], and specifically Subsections' (g) (2) (C) and (D) were incorrectly "clarified" by the Commission in its ***Order*** and that the FCC is without jurisdiction to impose these "clarifications" on existing or future

[14] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, codified as 47 U.S.C. § 521, et. *seq.* (The "1984 Cable Act").

franchises.[15] TCCFUI would oppose the Comments made by some cable providers and cable associations to apply these "clarifications" to all franchises.[16] The FCC lacks jurisdiction and was in error as to its "clarifications" in the interpretations of nonmonetary services applying as credits to the 5% franchise fee, and as to its narrow characterization of what constitutes "capital cost" for PEG access facilities. TCCFUI adopts by reference filed Comments to this ***Further*** *Notice* of several other parties on the lack ofjurisdiction by the FCC to interpret Section *622* [47 U.S.C. Sec. 542] as to what constitutes a part of the 5% franchise fee base.[17]

Section *622* (g) [47 U.S.C. Sec. 542 (g)] defines a "franchise fee" as follows:

(g) **"Franchise fee" defined**
For the purposes of this section [542]—
(1) **the term "franchise fee" includes any tax, fee, or assessment** of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;
(2) the term "franchise fee" does not include—
(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);
(B) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

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[15] ***Order,*** ¶ ¶ 94-120.

[16] National Cable and Telecommunications Association Comments filed April 20, 2007, particularly at pages 9-19; Charter Communication, Inc. Comments, filed April 20, 2007; and Time Warner Cable Inc. Comments filed April 20, 2007 ("Time Warner Comments".)

[17] Comments of the National Association of Telecommunication Officers and Advisors, The National League of Cities, The National Association of Counties, The U.S. Conference of Mayors, et *al*. filed April 20, 2007, at pages 11-12. ("NATOA Comments"); Comments of the Greater Metro Telecommunication Consortium, the City of Colorado Springs, Colorado and the City of Tacoma, Washington, filed April 20, 2007, at pages 6-8 ("GMTC Comments"); Comments of the League of Minnesota Cities, et al., filed April 20,2007, pages 8-11 ("Minnesota Cities Comments"); NJBPU Comments, at pages 11-13.

(C) in the case of any franchise granted after October 30, 1984, **capital costs** which are required by the franchise to be incurred by the cable operator **for public, educational, or governmental access facilities;**

(D) requirements or **charges incidental to the awarding or enforcing of the franchise,** including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under title 17.

While the definition of a "franchise fee" in subsection (g) (1) is broadly worded to include "any tax, fee, or assessment of any kind imposed by a franchising authority ...on a cable operator ...", subsection (g) (2) has a list of five exclusions of what a "franchise fee" does not include. Two of those franchise fee exclusions are "clarified" by the Commission in this *Order*, Subsections' (g) *(2)* (C) and (D). Subsection (g) (2) (C) pertains to capital cost for PEG access facilities as not constituting a franchise fee and Subsection (g) (2) (D) pertains to certain charges incidental to the awarding or enforcing of the franchise as not constituting a franchise fee. Additionally, the initial definition of a "franchise fee" in subsection (g) (1) has the premise that a "franchise fee" is any *monetary* tax, fee or assessment or tax.

These exclusions subsections were discussed as to there intent both in 1983, in the House Conference Committee Report when the original legislation was adopted and in 1999 by the staff of the FCC. Neither of those prior discussions comports with the recent clarification by the FCC in the *Order*, as was noted in the dissent.

TCCFUI would agree with the Separate Statement by Commissioner Adelstein characterizing the *Order* in this area, in which he stated:"

> Toddy's *Order* should make clear that, while any requests made by an LFA unrelated to the provision of cable service and unrelated to PEG or I-NET are subject to the statutory five percent franchise fee cap, these are not the type of costs excluded from the tenn "franchise fee" by section 622(g)(2)(C). That provision excludes from the term "franchise fee" any "capital costs that are required by the franchise to be incurred by the cable operator for public, educational, or governmental access

[18] *Further Notice*, Separate Statement Commissioner J. Adelstein, page 9.

> facilities." The legislative history of the 1984 Cable Act clearly indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.' [19]

The FCC seems to assert that certain "nonmonetary in-kind contributions" may be valued, with that "value" being included towards the 5% franchise fee cap.[20] But nonmonetary in-kind services are not part of the definition of what constitutes a franchise fee, as noted in the above quote by Commissioner J. Adelstein in which he cites the 1984 Cable Act's House Conference Committee Report—therefore nonmonetary in-kind services cannot constitute a "credit" against the 5% franchise fee. The FCC's Chief of the Cable Services Bureau has also taken this same position some eight years ago. In a June 25, 1999 letter opinion from Ms. Deborah A. Lathen, then the FCC's Chief of the Cable Services Bureau, when she cited also that same 1984 Cable Act's House Conference Committee Report when she wrote:

> The legislative history explains that "Subsection 622(g)(2)(C) establishes a specific provision for PEG access in new franchises [post-1984 Cable Act]. In general, this section ***defines as a franchise fee only monetary payments made by the cable operator, and does not include as a "fee" any franchise requirements for the provision oj services, facilities or equipment.*** As regards PEG access in new franchises, payment for capital costs [for PEG access facilities] required by the franchise to be made by the cable operator are not defined as [part of the 5% franchise] fees under the [1984 Cable Act] provision. These [capital costs] requirements may be established by the franchising authority under Section 611(b) or Section 624(b)(1).[21]

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[19] "The legislative history of 1984 Cable Act provides 'in general, [section 622(g)(2)(C)] ***defines as a franchise fee only monetary payments*** **made by the cable operator,** ***and does not include as a 'fee' any franchise requirement for theprovision of services, facilities or eqaipment.*** **As** regards PEG access in new franchises, payments for capital costs required by the franchise to be made by the franchise to be made by the cable operator are not defined as fees under this provision.' H.R. REP. No. 98-934, at 65 reprinted in 1984 U.S.C.C.A.N. 4702." [Bold and italics added. This was designated as Note 37 in *Order,* Separate Statement Commissioner J. Adelstein, page 9-10]

[20] *Order,* ¶ 104 "free or discounted services"

There is no ambiguity in this language from section 622 which needs further clarification by the Commission. Clearly as the statutorily defined "franchise fee" only includes "monetary" payments—non-monetary contributions of services-free or discounted, are, by definition, already excluded from consideration as a franchise fee, and thus cannot be counted as a "credit" on the 5% franchise fee.

***Order's* specific references to possible "credits" towards the 5% franchise fee cap:**

(1) **"Free or discounted services" as a "credit" against the 5% franchise fee cap. *(Order*** ¶¶ 103-104).

In Section 622(g)(2)(D) charges "incidental" to the awarding or enforcing of a franchise are excluded from being considered a "franchise fee". The FCC states that "the term 'incidental' in Section 622(g)(2)(D) should be limited to the list of incidentals in the statutory provision, as well as other minor expenses, as described below." ***(Order,*** ¶ 103.) But then the FCC arguably expands, in an ambiguous way, the phrase "other minor expenses" to exclude from the term "charges incidental" to undefined "free or discounted services provided to an LFA,", and then indicates these undefined "free or discounted services" could constitute a credit toward payment of the 5% franchise fee. ***(Order,*** ¶ 104.) The potential consequences to cities by this characterization of any undefined "free or discounted services" as being something which could constitute a credit toward payment of the 5% franchise fee are horrendous. Cable operators have for decades agreed to provide various "free or discounted services", such as basic cable services to schools and municipal buildings for decades. Frequently these cable services have been included in cable franchises upon the initiation of cable providers, including Time Warner by its "Social Contract" which "offered" an

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[21] *City of Bowie, Md. c/o David Deutsch*, **14** FCC Rcd 9596, 9597-98 (1999), *clarifying* 14 FCC Rcd 7675, 7677 (1999).(Bold and italics added.)

upgrade in the context of resolving future potential rate cases, as approved by the FCC November 30, 1995. Cable service to public buildings was one two specific of the services grandfathered in by the 2005 Texas Cable Franchise Statute (Chapter 66, Section 66.006 (d)).The 2005 Texas Cable Franchise Statute, as a state law, was not preempted by the ***Order,*** the existing local unexpired franchises, which include cable services to public buildings, should continue without the specter of a credit of their "value" on franchise fees. A cable operator is not entitled to a "credit" on its franchise fee payments equal to the value of the free or discounted services provided to an LFA.

(2) **In-kind payments as a "credit" against the 5% franchise fee cap.** (*Order*,¶¶ 105-108.)

The FCC suggests that counts as part of the franchise fee (and thus a potential credit) any in-kind payments that are "unrelated to the provision of cable services by a new competitive entrant." While the FCC ***Order*** does not provide my specific examples? it quotes, without explicitly accepting them, a laundry list of vague cable industry allegations–traffic light control systems, prepaid franchise fees, scholarships by Grande in San Antonio, a video hookup for a Christmas celebration, and money for wildflower seeds. ¶¶ 106-107. Since these examples mingle the atypical franchise requirements with requirements that are have been viewed as cable-related, such as fiber capacity connecting traffic signals as part of an I-Net, the FCC should clarify these characterizations.

(3) **PEG Fees used for "non-capital cost" as a credit against the 5% franchise fee cap.** (*Order*,¶¶ 109-111.)

Federal law contains several specific provisions authorizing a PEG fee", and 47 U.S.C. § 542(g)(2)(C) expressly excludes a PEG fee spent on *capital cost items for PEG access facilities"*

[22] ***See*** 47 U.S.C. § 531 (general PEG requirements) and 47 U.S.C. § 541 (a) (4) (B) (a franchise authority may require adequate financial support for PEG facilities).

from the statutory definition of franchise fee.[24] The *Order* reiterates that a city may require Public, Educational, Governmental Access Channel ("PEG") financial support for the capital costs of "building PEG facilities" or "constructing PEG facilities", and if so, they are not subject to the 5% franchise fee cap. *(Order*,¶ 109.) Following prior FCC case law, the *Order* states non-capital cost, what the FCC calls "PEG support payments," may count as franchise fees. The *Order* states "PEG support payments" means use of PEG Fees as an operating fund, which "may include, but are not limited to, salaries and training." *(Order*, ¶ 109.) Clearly the two types of expenditures-one for capital cost items and the other for support of the on-going for operations are, for the most part, mutually exclusive, but there certainly are grey areas. The *Order* has a narrow characterization of what constitutes a "capital cost"—i.e. "building PEG facilities" or "constructing PEG facilities". TCCFUI would respectfully suggest that the *Order* improperly construes capital cost items, by excluding items such as equipment which has a useful life of longer than one year, as not failing within the 47 U.S.C. § 542 (g) (2) (C) exclusion from the definition of a franchise fee. Equipment which has a useful life of longer than one year has not been contested by cable providers as they used that same standard in cable rate cases to show capital cost. PEG fees spent on equipment that last longer than a year, cameras and the like, has always been considered a PEG "capital cost" but now such expenditures may be asserted as a noli-capital cost to count as a credit against the franchise fee.

The term ***"public, educational, or governmental access facilities"*** is defined broadly in federal law as:

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[23] 47 U.S.C. § 522 (16), "'public, educational, or governmental access facilities' means---(A) channel capacity designated for public, educational, or governmental use; and (B) facilities and equipment for the use of such channel capacity;"

[24] *47* USC § 542(g) (2) (c) "the term 'franchise fee' does not include ... capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."

"channel capacity designated for public, educational, or governmental use; …. and facilities and equipment for the use of such channel capacity."[25]

However, the term "capital cost" is not defined in the Cable Act, other federal law setting forth principles governing the term "capital expenditure" are helpful. Under those principles, the purchases of equipment that has a useful life of over one year, or improvements to equipment that will last beyond one year are "capital expenditures."

United States Internal Revenue Service ("IRS") regulations defining "capital expenditures" provides guidance as *to* what constitutes a "capital cost." IRS regulations provide benchmarks that generally include the amount paid for the acquisition, permanent improvement, or betterment of property that substantially extends its useful life beyond one year.[26] The benchmarks include:

1. Whether the funds are paid for "new buildings" or "permanent improvements" or "betterments made to increase the value *of* any property or estate". [Treas. Reg. 1.263(a)-1, (a)(1)]
2. Amounts expended in "restoringproperty". [Treas. Reg. 1.263(a)-1, (a)(2)]
3. Amounts that are "paid or incurred: (1) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use". [Treas. Reg. 1.263(a), 1(b)]
4. Capital expenditures expressly do not include "incidental repairs and maintenance of property". [Treas. Reg. 1.263(a)-(1), (b)]

The FCC could use the IRS regulations as a guide for PEG fee "capital cost expenditures" because they provide a reasonable standard as to compliance with the federal law. The IRS

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[25] 47 U.S.C. § 522 (16).

[26] U.S. Treasury Regulations, 26 CFR. Sec.1.263 (a)-1 and (a)-2.(Treas. Reg. 1.263). The IRS regulations include, as examples of capital expenditures, "[t]he cost of acquisition, construction, or erection of buildings, machinery and equipment, furniture and fixtures, and similar property having a useful life substantially beyond the taxable year."

benchmarks establish a custom and practice that is used and accepted by cable and video providers in their normal course of business.

The IRS regulations by implication treat major maintenance expenditures as a capital cost (because these expenditures prolong the useful life of the capital asset), ordinary routine maintenance items (such as painting, cleaning, and other normal maintenance) are not treated as such. The distinction between ordinary routine inaintenance cost and "capital" maintenance cost is not always precise. *An* example is a vehicle. Replacing tires, light bulbs, water, and oil on a vehicle is ordinary routine maintenance, but the rebuilding of the engine that extends or prolongs the vehicle's life substantially is a capital expenditure.

Below is a suggested way to view the distinction between "capital cost" expenditures, which are excluded from being a "franchise fee" and support payments or expenditures for PEG access facilities, which may be part of the franchise fee.

Capital PEG access facilities – In General: Capital facilities include all facilities and equipment that have a useful life of longer than one year, and that are used for PEG access facilities to provide or enhance the provisioning of PEG channel capacity, programming, and transmissions for a governmental use. For example, capital facilities include, but are not limited to: (1) production facilities, such as a studio office and furnishings; (2) physical sets, coaxial and fiber lines and all other physical connections; (3) vehicles dedicated for the support of PEG access facilities; and (4) cameras or other equipment having a useful life of more than one year. Additionally, any purchase that increases or adds substantial value to capital PEG access facilities mentioned above, or that adapts PEG access capital facilities to a new or different use, or that constitutes a betterment of those capital facilities, is a permissible use of the PEG fee.

PEG access capital facilities – Specific Examples: The following are some examples of capital facilities and permissible capital expenditures:

PEG channel studios: A PEG fee spent to make general improvements to city hall may not always be a proper expenditure. But a PEG fee is spent for a PEG channel production studio, even if in City Hall, and much of the equipment necessary to operate a PEG access channel, is a proper expenditure.

Institutional Networks: A local franchise may require that "channel capacity on institutional networks be designated for educational of governmental use..."[27] So the I-Net can be a component of PEG access facilities. Therefore, to the extent there are capital expenditures on the I-Net for governmental uses those expenditures are properly excluded from being a part of the 5% franchise fee as those expenditures are "capital cost" for PEG access facilities. It is not unusual for a municipality and a local public school district to share I-Net capacity for cable-casting of the school district's educational access channel by transmissions via the I-Net. If the educational channel was being cable-cast in part via a physical link through tho I-Net, then any capital expenditure for that link would be a PEG capital facilities cost, and thus the PEG fee would not be included as part of the franchise fee. It would be the same if equipment is purchased that has a useful life of more than one year and other expenditure enhance or expand the channel capacity in the I-Net for a governmental use.

The FCC should clarify these characterizations.

(4) **More than "adequate" PEG and I-Net Support as a credit against the 5% franchise fee cap.** *(Order,* ¶ ¶ 112-120.)

The FCC Order defines what constitutes "adequate" PEG support that a city may require under 47 U.S.C. § 531 as being "satisfactory or sufficient" *(Order,* ¶ 112.) The FCC concluded

[27] 47 U.S.C. § 531 (b) and "Institutional network" means "a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers." 47 U.S.C. Sec. 531 (f).

that "it is unreasonable for an LFA to require a new entrant to provide PEG support that is in excess of the incumbent cable operator's obligations." ***(Order,*** ¶ 120.) Such a standard will only lock a municipality into what currently is required by the incumbent, notwithstanding changing conditions of what was once "adequate" being no longer "adequate" (One simple example- City population growth leads to more public schools-should those new schools not be provided PEG cable service?). Further, the "clarification" of "adequate" to mean "satisfactory or sufficient" and "in excess" does not appear to be any more precise than "adequate". This FCC language may give rise to disputes of what are "excess" PEG requirements.

TCCFUI Reply Comments to Time Warner's Comments on use of GAAP.

The term "gross revenue" as used in 47 USC Section 542(b), has been construed broadly to include all the "gross revenue" derived from the cable franchise in *City of Dallas, Tex. v. F.C.C.*, 118 F.3d 393, 394 (5th Cir. 1997) ("*City of Dallas*").[28] In the Time Warner Comments they assert that the Generally Accepted Accounting Principles ("GAAP") should apply to all franchises, whether GAAP was part of the negotiated franchise or not.[29] While GAAP could have been used, as it is reasonably well know, each franchise, as locally negotiated may have used other accounting criteria rather than GAAP. To preempt all franchise and mandate the use of GAM — an accounting methodology known at the time of the negotiations by both parties--but apparently rejected-- would run counter to the public policy of allowing each local community negotiate a franchise which tits their circumstances. **As** noted below, this position of Time Warner is inconsistent with Time

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[28] 47 USC Section 542(b) "Amount of fees per annum----For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."

[29] Time Warner Comments, page 9-11

Warner's prior FCC filings. TCCFUI would oppose such a unilaterally imposition by the FCC of preempting all franchises in this manner.

Time Warner argues GAAP should be used by following an (incorrect) premise that the *City of Dallas* Court found "gross revenue" to be a "technical term" and if so, then GAAP would apply. That is incorrect. The *City of Dallas* Court expressly rejected such a limited technical meaning to the words "gross revenue". The Court stated:

> The phrase 'gross revenue' has a generally accepted meaning: unless expressly limited by the terms of a statute, regulation or contract, gross revenues means all amounts received from operation of a business, without deduction. For example, Black's Law Dictionary defines 'gross' as 'before or without diminution or deduction' or 'not adjusted or reduced by deductions or subtractions' 'Gross Revenues' is defined by Black's as 'receipts of a business before deduction for any purpose except those items specifically exempted.'[FN3. Webster's New International Dictionary, 1103 (2d Ed.1940) defines 'gross' as 'Whole; entire; total; without deduction.... The gross earnings, receipts or the like are the entire earnings, receipts or the like, under consideration, without any deduction."] [page 3951. .....We conclude that normally the phrase 'gross revenue' unambiguously means all revenues or receipts of a business, without deduction. [page 396]

The *City of Dallas* Court then concluded that the term "gross revenue" was not a technical or specialized term. The *City of Dallas* Court specifically found, when it reviewed that issue, that:

> There is nothmg in the text of the statute, the structure of the statute, or the sparse Committee reports to conclude that Congress intended 'gross revenue' to have a specialized meaning as used in Section 542(b)." [page 396].

Therefore, as the term "gross revenue" did not have a specialized meaning in which one would use the technical industry standards, such as GAAP, the *Dallas Court* opined that:

> We therefore remain persuaded that Congress intended 'gross revenue' to have its normal, ordinary and common meaning."[page 397]. "In conclusion, gross revenue normally includes all revenue collected from any source." [page 398].

The Time Warner Comments (on page 11) partially quotes from the *City of Dallas* case[30] that the *City of Dallas* Court concluded that "gross revenue'' in the Cable Act was a "technical term". And then the logic follows that if "gross revenue" was a technical term, it would be construed as the term was used in the applicable in the industry. Time Warner chooses the accounting industry and specifically asserted that the GAAP would apply. Following that (incorrect) premise that the *Dallas* Court found "gross revenue" to be a "technical term" Time Warner incorrectly implies that the *City of Dallas* Court relied upon GAAP to reach its conclusions in the case by refemng to the standard setting body for GAAP, the Financial Accounting Standards Board or FASB. The *City of Dallas* Court did not rely on GAAP and, in fact, the *City of Dallas* Court expressly rejected such a limited technical meaning to the words "gross revenue". The *City of Dallas* Court found that the term "gross revenue'' was not a technical or specialized term. The court in the *City of Dallas* case specifically found, when it reviewed that issue, as quoted above from page 396 of the case, that "gross revenue" was not meant to be a technical term, that the term did not have a specialized meaning in which you would use the industry standards (such as GAAP), but rather, the Court went on to state, on page 397, that "We therefore remain persuaded that Congress intended 'gross revenue' to have its normal, ordinary and common meaning."

Time Warner also fails to refer to a FCC cable rate case order from 1999 in which Time Warner participated in as a party, the *Time Warner Orlando* ***Order?'*** The *Time Warner Orlando Order* is at odds with the position of Time Warner has taken in their recent Comments in this *Further Notice* promoting use of *GAAP*. The *Time Warner Orlando Order* did not adopt the use of

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[30] The full quote was "The Supreme Court has recognized that *when a statute uses a technical term*, you must assume that Congress intended to have that meaning ascribed to it by the industry under regulation." (Italics added.)

GAAP accounting in that Order, in part because Time Warner was opposed it, citing the then recent *City of Dallas* case for support.

The *Time Warner Orlando Order* was cable rate case on appeal to the FCC. One of the principal issues involved unpaid subscriber revenue, i.e. bad debt, and whether GAAP should apply or not. The City of Orlando argued GAAP should apply—and Time Warner argued GAAP should not apply. The FCC agreed with Time Wamer and concluded that those unpaid subscriber bills would not be included in the gross revenue base. The FCC in the *Time Warner Orlando Order* in paragraph 9, refers to the City of Orlando's argument on why unpaid subscriber revenue should be included in the franchise fee base, the City of Orlando specifically refers to GAAP as a reason to include those unpaid subscriber revenue in the gross revenues. The FCC opinion, in refemng to the city's argument, states as follows:

> According to the City, generally accepted accounting principles and the Financial Accounting Standard Board's Statement of Financial Accounting Standards Number 5 do not provide for the deduction of bad debts in determining one's gross revenues, but instead treats bad debts in the same manner as other operating expenses which are to be taken into account in determining the net income of the business, not as a direct offset to gross revenues.

In the *Time Warner Orlando Order* the FCC rejected the City of Orlando's application of GAAP principles to uncollectibles. In part, the FCC apparently did that in response to Time Warner's argument in citing the same *City of Dallas* case discussed above. In footnote 22, the FCC references a supplemental Time Warner filing by quoting it, in which Time Warner specifically relied on the *City of Dallas* case. The FCC, repeats the argument of Time Warner, as follows:

> See Time Warner supplement at 2 ("gross revenues is defined by Black's [law Dictionary] as receipts of a business before deduction for any purpose except those items specifically exempted), citing Dallas v. FCC at 118 F.3d at 395; "industry accounting practices require that money collected from subscribers to pay franchise

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[31] *Time Wamer Entertainment/Advance-Newhouse Partnership and the City of Orlando Florida,* 14 FCC Rcd. **7678** (FCC *1999)* ("*Time Wamer Orlando Order*").

fees be included in gross revenues," Id.; "The term 'all gross revenue' . . . is to be construed in the broadest sense, i.e., all money received" Id.)

So two years after the *City of Dallas* case: (1) the FCC rejected the application of GAAP to its treatment of "bad debt", concurring with the arguments of Time Warner to not use GAAP; and (2) Time Warner cited the *City of Dallas* for the same principle i.e. that gross revenue is not construed in a narrow sense in accordance with GAAP but it is to be construed in its ordinary meaning, "in the broadest sense". TCCFUI's position is the same as Time Warner's position in the 1999 *Time Warner Orlando Order, GAAP* should not apply in all franchises and "gross revenue" is to be broadly construed. Time Warner's FCC quoted arguments from 1999 may still be constructive to the FCC in this *Further Notice.* Respectfully the FCC should give weight to this prior FCC *Time Warner Orlando Order* in this *Further Notice.*

IV. LACK OF FCC JURISDICTION UNDER SECTION 621 OR 626 [47 U.S.C. § 541 OR § 546] TO PREEMPT EXISTING FRANCHISES.

TCCFUI opposes the *Further Notice's* tentative conclusion *(Further Notice* at ¶ 140) that the findings made in the proceeding should apply to existing franchises, whether at the time of renewal of those current franchises, or thereafter. The proceeding was and is based on Section 621(a)(1) of the Communications Act, 47 U.S.C. § 541(a)(1), and the rulings adopted in the *Order* are specifically, and entirely, directed at "facilitat[ing] and expedit[ing] entry of new cable competitors into the market for the delivery of video programming, and accelerat[ing] broadband deployment" *(Order* at ¶ 1).

TCCFUI disagrees with the rulings in the *Order,* both on the grounds that the FCC lacks the legal authority to adopt them and on the grounds that those rulings are unnecessary to promote competition, violate the Cable Act's goal of ensuring that a cable system is "responsive to the needs and interests of the local community," 47 U.S.C. § 521(2), and are in conflict with several other provisions of the Cable Act (47 U.S.C. § 521, et seq.). But even assuming, for the sake of argument, that the rulings in the *Order* are valid, they cannot, and should not, be applied to incumbent cable operators. By its terms, the "unreasonable refusal" provisions of Section 621(a)(1) apply to "additional competitive franchise[s]," not to incumbent cable operators. Those operators are by definition already in the market, and their future franchise terms and conditions are governed by the franchise renewal provisions of Section 626 (47 U.S.C. § 546), and not Section 621(a)(1).

TCCFUI adopts by reference filed Comments of several other parties on the lack of jurisdiction by the FCC to preempt locally adopted existing incumbent franchises.[32]

V. THE FCC CANNOT NEGATE THE STATUTORY REQUIREMENT OF 47 U.S.C. § 541(B) (1) TO OBTAIN A CABLE FRANCHISE FOR THOSE ENTITIES THAT HAVE A PRIOR, BUT LIMITED RIGHT TO USE THE RIGHTS-OF-WAY.

TCCFUI would reject the *Order*'s conclusions that preempt control of the public rights-of-way as not being a Fifth Amendment taking in potentially awarding a cable franchise to entities that have some sort of "preexisting" right to use the public rights-of-ways. *(Order,* ¶ ¶ 134-136.) The *Order* seems to ignore that an existing franchise or other grant of authority to use the rights-of-way, at least in Texas, is for a limited purpose, and not open ended as to use of the rights-of-way. As TCCFUI noted in its initial and Reply Comments in the *Cable Franchising NPRM*[33], if an entity has been granted the right to use the public rights-of-ways, it is not carte blanc to be used "at will" for any and all purposes, even if otherwise lawful. That right to use was granted for a limited purpose

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[32] NATOA Comments, at pages 15-16, see also pages 4-11 on lack *of* jurisdiction as to incumbents even at renewal; GMTC Comments, at pages 2-3; Comments of the Texas Municipal League and the Texas City Attorneys Association, filed April 30, 2007, at pages 6-7 ("TML Comments"); Minnesota Cities Comments, pages 3-7; Comments Submitted by Certain Florida Municipalities, filed April 30, 2007, pages 1 ("Florida Comments").

[33] As is discussed in detail in the *Cable Franchising NPRM* Comments of TCCFUI filed Feb. 6, 2006, at pages 29-35, and in TCCFUI's Reply Comments filed March 27,2006, at pages 16-18.

and typically for incumbent telephone providers, such as Verizon and AT&T, for telecommunications purposes[34], which is mutually exclusive from "cable service", in the statutory definitions of the Cable Act. And the compensation scheme for that limited use of the rights-of-way would be consistent with that limited purpose. In Texas this requirement for a separate cable franchise is also addressed in the 2005 Texas Cable Franchise Statute.[35]

A separate franchise is required to provide cable service. The Cable Act has provided since 1984 that "…a cable operator may not provide cable service without a franchise."[36] A franchise may only be granted by a granted by the franchising authority. "Franchising authority" is defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise."[37] The Commission has not been granted any authority to negate the statutory requirements to allow cable service to be provided without a separate cable franchise, as is required by the Cable Act.

Not only can the Commission not bypass or diminish the requirement for a cable franchise as required in the Cable Act, it cannot reduce the compensation of a cable provider to less than its fair market value in Texas, as was detailed by the case law cited in the initial and Reply Comments of TCCFUI in the *Cable Franchising NPRM*.[38]

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[34] ***See*** TEXAS LOCAL GOV'T CODE, CHAPTER 283 § 283.052 (a) (1) "to provide telecommunications services".

[35] No cable services may be provided without a state issued franchise unless there is an existing municipal cable franchise. 2005 Texas Cable Franchising Statute, Section 66.003(a).

[36] 47 U.S.C. § 541(b) (1).

[37] 47 U.S.C. § 522(10)

[38] *Fleming v. Houston Lighting and Power,* 138 S.W. 2d 520, 143 S.W.2d 923 (Tex. 1940) citing the *City of St. Louis* as authority for collecting a value-based rental charge as compensation for use of the public streets. *See City of Dallas, Tex.* ***v.*** *F.C.C.*, 118 F.3d 393, 397-398 (5th Cir. 1997). "Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public light-of-ways. See, e.g., [Page 398] ***City*** *of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 13 S.Ct. 485, 37 L.Ed. 380 (1893) (noting that the fee paid to a municipality for the use of its rights-of-way were rent, not a tax)." See also Texas Constitutional prohibition against a "gift" of public property

VI. CUSTOMER SERVICE STANDARDS AND THE PUBLIC UTILITY COMMISSION OF TEXAS.

TCCFUI strongly endorses the *Further Notice's* tentative conclusion (at para. 142) that Section 632(d)(2) (47 U.S.C. § 552(d)(2)) bars the FCC from "prempt[ing] state or local customer service laws that exceed the Commission's standards," and from "preventing LFAs and cable operators from agreeing to more stringent [customer service] standards" than the FCC's.

TCCFUI would again urge the Commission to clarify that the Commission Customer Service Obligations are enforceable by the Public Utility Commission of Texas ("PUCT") and the PUCT may promulgate additional standards, as requested in TCCFUI's Reply Comments in the *Cable Franchising NPRM*.[39] In the PUCT Comments filed in the *Cable Franchising NPRM*, they expresses some concern over the status of "customer care and enforcement" issues." Therefore the Commission should make it clear that the PUCT, as the statutorily designated franchising authority in Texas, both continue to enforce the Commission standards, as set out in the Commission Rules of 47 C.F.R. § 76.309, and may promulgate additional standards consumer protection laws, consistent with 47 U.S.C. Section (a) and (d).

VII. CONCLUSION

TCCFUI urges the Commission to end this further rulemaking as it is without jurisdiction or authority, as discussed above. However to the extent the Commission deems it has the authority, that it not further restrict, beyond what is in current federal law, the processes by which local governments, and now in Texas, the PUCT, awards a cable franchise. In the event the Commission

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Texas Constitution, Article 3, Section 52. *See Pasadena Police Association v. Pasadena,* 491 S.W. 2d 388 (Tex. Civ. App. – Houston [1st Dist.] 1993).

[39] Reply Comments of TCCFUI in the *Cable Franchising NPRM*, filed March 27, 2006, at pages 18-19

deems it appropriate to delineate standards as to when and what constitutes an unreasonable term in an existing cable franchise, then those standards should be deferred and not apply in a state such as Texas as the 2005 Texas Cable Franchising Statute. TCCFUI urges that whatever standards or requirements are established by the Commission, if any, that those standards or requirements must not undercut or diminish the standards set out in the state-issued franchise in Texas pursuant to the 2005 Texas Cable Franchising Statute. TCCFUI urges the Commission to clarify that non-monetary services cannot be counted as part of the franchise fee, and that capital cost items for PEG access facilities was interpreted overly narrowly in the *Further Notice.* TCCFUI welcomes the opportunity to submit these Reply Comments and looks forward to further dialogue with the Commission.

Respectfully submitted,

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[40] PUCT Comments in the *Cable Franchising NPRM,* page *3*